United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 74-2658

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FRED STARK AND JAMAICA 201 ST. CORP., INC.
AND JAMAICA 202 ST. CORP., INC.,
Respondent.

On Application For Enforcement Of An Order Of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ALLISON W. BROWN, JR.,
GRANT MORRIS,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

ABS DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-5537

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company interfered with its employees' rights in violation of Section 8(a)(1), and discriminatorily discharged six employees because of their union activities in violation of Section 8(a)(3) and (1) of the Act.

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq.*), for enforcement of its order, issued on September 6, 1974, against Fred Stark and Jamaica 201 St. Corp., Inc. and Jamaica 202 St. Corp., Inc. (hereinafter collectively referred to as "the Company"). The Board's Decision and Order are reported at 213 NLRB No. 38 (A. 28-29).[1] This Court has jurisdiction, the unfair labor practices having occurred in New York City.

I. THE BOARD'S FINDINGS OF FACT

A. The employees seek union representation; the Company discharges the union adherents.

Stark is three-member copartnership comprised of Fred Stark, and his son, Harold Stark, and Rita Stark. It is engaged in the ownership and rental of commercial and residential buildings and properties. Jamaica 201 and Jamaica 202 are corporations engaged in the rental of real estate. Stark, Jamaica 201, and Jamaica 202 have common officers, ownership, directors and operators, and constitute a single integrated business enterprise (A. 3; 33).

In April 1973, some of the Company's employees evidenced interest in being represented by the Union.[2] On April 30, Union organizer Tony Poccio met with employees Charles Thompson, Roger Evans, Wayne Huff,

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[1] "A." references are to the Appendix. References preceding a semicolon are to the Board's findings of fact; those following are to the supporting evidence.

[2] Local 32B, Service Employees International Union, AFL-CIO.

Jeffrey Maksymchak, Felipe Ortiz, George Peters and Kenroy Bishop. Each of the seven employees signed an authorization card at the meeting (A. 4; 60, 82, 109-110, 114-115). By letter of May 8, the Union requested the Company to recognize it as bargaining representative for the employees (A. 5; 47-48). The Company received the letter on May 10 and within a week terminated six of the seven employees who signed cards. Thus, on May 11, Thompson, Evans, Huff and Maksymchak were discharged (A. 5, 15-16; 50, 111, 132, 83). On May 16, Ortiz was discharged and the following day, May 17, Peters was discharged (A. 5, 9; 174, 205).

B. Circumstances surrounding the six discharges.

1. The May 11 discharges

Evans, Huff, and Maksymchak, were employed as general laborers for the Company. Thompson was employed as a handyman. Thompson, Evans and Maksymchak had each worked for the Company for 12 months prior to their discharges, and Huff, who had previously been employed by the Company for a period in 1972, worked for 4 months prior to his discharge (A. 46-47, 81-82, 109-110, 131-132). Peters was hired by the Company in September 1971. He worked in property maintenance. He received his assignments from Fred or Harold Stark and was assigned a work crew of two or more employees to direct. He worked with the crew and was primarily responsible for seeing that work projects were properly completed (A. 22; 214, 279-280).[3]

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[3] Although Peters had the title of foreman and the Company contended in this proceeding that he was a supervisor, the Board found that he was not a supervisor within the meaning of Section 2(11) of the Act. The propriety of this Board finding is discussed *infra*, pp. 13-14.

The day after receiving the Union's request for recognition, Harold Stark assigned Thompson, Evans, and Huff to a cleaning job. Due to the difficulty in completing the task, they decided that help was needed and, as a result, drove to the Company's office in order to pick up more men. Since Harold Stark was away from the office, the three employees waited in their truck for him (A. 6-7; 50-51, 66-67, 111-112, 134). Shortly thereafter, Maksymchak, a part-time student-employee, reported for work at the office and was told by a secretary to wait for Helga Schenck, the Company's office manager, to arrive. He chose to wait outside the office in his station wagon and was joined by Thompson, Evans, and Huff (A. 6-7; 51, 83, 112, 134).

While they were waiting, Maksymchak said that he did not feel well and was not going to work (A. 7; 51, 78, 116). When Harold Stark arrived at the office, he immediately approached the station wagon where the four employees were sitting. Upon being asked by Harold Stark whether he was going to work that day, Maksymchak replied that he did not feel like working (A. 7; 83, 112, 134). In response, Harold Stark, addressing himself to the four employees, stated that "you are all drunk, you are all fired" (A. 7; 52, 83, 112, 134).

The following day, Maksymchak returned to the Company's office and requested his job back. Harold Stark replied by telling him to wait for a few weeks "till things cool off" (A. 8; 102-103). Maksymchak later returned to the office several times within a two-month period and, on one occasion, Harold Stark told him that joining the Union was "like stabbing [Harold Stark] in the back" and that he could have his job back if he got out of the Union. Maksymchak decided to remain in the Union and not attempt to obtain further work with the Company (A. 8; 84, 104-105).

Shortly after the May 11 discharges, Fred Stark telephoned Rudolph Larmond, a Union official, and inquired as to the meaning of the Union's

letter seeking recognition. After briefly mentioning the Union's purpose, Larmond gave Fred Stark the names of two or three union adherents and the latter replied, "Oh, I fired them. They're all drunk, and I fired them" (A. 5; 43).

2. George Peters

On May 14, Fred Stark met with Peters at a job site. Referring to the Union, Stark asserted that Peters had "stabbed" him in the back, and stated that he had just fired four employees, naming the four union members discharged on May 11. Stark added, "I'm surprised at you, Mr. Peters, you're supposed to be my foreman, you know, you're not supposed to be joining a union . . ." Stark also stated that he would forget about the entire matter and that Peters could keep his job if he stayed away from the Union (A. 9; 202-203).

On May 15, Peters told Fred Stark that he would be absent from work the following day because he was going for medical treatment at the Veterans Administration Hospital.[4] Stark said, "[M]ake sure you stay away from the union." The following day, instead of going to the hospital, Peters, who was fearful of the warnings by Fred Stark, drove the four discharged employees to the Union's headquarters, where they gave affidavits concerning their discharges. When Peters reported to work the next day, May 17, Fred Stark said, "I see you went to the Union again yesterday. I told you to stay away from the Union . . . evidentally [*sic*], Mr. Peters you don't learn . . . you're fired" (A. 11; 205).

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[4] Peters told Stark of the reason for his going to the hospital. The condition that he described is the result of an on-the-job injury Peters incurred in 1971 while he was employed by the company (A. 10; 208).

3. Felipe Ortiz

Ortiz, who was a porter at one of the Company's rental buildings, was responsible for taking care of the public areas in the building and on the building grounds. While Ortiz was on the building grounds on May 16, Harold Stark told him to pick up dog manure with his hands (A. 9; 163, 169, 172, 178, 185). Ortiz requested the use of a shovel and broom, but Stark insisted that he remove the dog manure only with his hands. When Ortiz refused to perform the assignment, Harold Stark told him "[Y]ou're fired, go home" (A. 9; 172, 186).

C. Harold Stark's coercive conversation with employee Bishop

On May 17, shortly after the discharge of Peters, Harold Stark had a brief discussion with employee Kenroy Bishop concerning the Union. Stark stated that he had "fired all the guys" who had signed for Union except Bishop. Stark warned, "[T]he Union is no good . . . they're going to mess this place up," and that Bishop should "give up on the union, because it won't come here" (A. 12; 146-147).

II. THE BOARD'S CONCLUSION AND ORDER

On the basis of the foregoing facts, the Board, in agreement with the Administrative Law Judge, found that the Company violated Section 8(a)(3) and (1) of the Act by discharging the six employees because of their union activity. The Board also found that the Company violated Section 8(a)(1) by coercively warning Bishop and Peters concerning their union activity and by telling Maksymchak that he could have his job back if he got out of the Union.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with,

restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. Affirmatively, the Board's order requires the Company to offer the six discharged employees reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges. Further, the Board's order requires the Company to make the employees whole for any loss of earnings they may have suffered as a result of the discrimination against them. The Company is also required to post appropriate notices.

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH ITS EMPLOYEES' RIGHTS IN VIOLATION OF SECTION 8(a)(1), AND DISCRIMINATORILY DISCHARGED SIX EMPLOYEES BECAUSE OF THEIR UNION ACTIVITY IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT.

As the Board found, the prime indicator of the Company's anti-union motive in discharging the six employees was the coincidence in time between its receipt of the Union's demand for recognition and the summary discharge within a week of six of the seven union adherents. The "stunningly obvious" timing of the discharges is strong evidence that the Company was motivated by anti-union considerations in effecting the discharges. *N.L.R.B. v. Rubin*, 424 F.2d 748, 750 (C.A. 2, 1970); and see, *N.L.R.B. v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 296 (C.A. 2, 1972). Beyond the timing of the action, the additional evidence relied on by the Board in finding the discharges unlawful turns largely "around credibility resolutions" by the Administrative Law Judge (A. 12). Such resolutions, of course, are within the province of the trier of fact and normally will not be disturbed upon review by this Court. See, *N.L.R.B. v. L.E. Farrell Co.*, 360 F.2d 205, 207 (C.A. 2, 1966); *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 136 (C.A. 2, 1968).

As the Administrative Law Judge noted, some of the evidence pointing to the Company's discriminatory motivation for the discharges was not specifically denied (A. 13). Thus, the Judge found credible employee Kenroy Bishop's testimony that Harold Stark told him that he had fired everybody who had signed for the Union, except Bishop, and that the Union was no good and would "mess this place up" (A. 12; 146-147). The Judge noted that Harold Stark did not specifically deny Bishop's testimony as to these statements (A. 13). Nor did Harold Stark specifically deny Maksymchak's testimony that after repeated efforts to have Stark rehire him, the latter finally said that Maksymchak could have his job back if he got out of the Union.

The Administrative Law Judge also found it significant that Fred Stark was not called as a witness by the Company, even though Peters testified that Fred Stark told him on May 14 that he had fired the four union men on May 11, and that Peters could keep his job if he stayed away from the Union. Peters also testified that when Fred Stark discharged him on May 17, Stark told him that it was because he failed to stay away from the Union. Harold Stark testified that he was with his father on the two occasions in question and that his father did not make the statements about the Union that were attributed to him by Peters. However, the Judge credited Peters' account of these conversations, including his assertion that he was alone with Fred Stark when the May 14 conversation occurred (A. 19). Further, because Fred Stark was in the hearing room throughout the hearing and was not called as a witness, and because no explanation was given for this omission, the Administrative Law Judge properly held that an adverse inference was warranted (A. 14). The failure in the circumstances to call as a witness the person in a position to know the disputed facts "is itself persuasive that [his] testimony, if given, would have been unfavorable to [the Company]. The production of weak evidence when strong evidence is available can only lead to the

conclusion that the strong would have been adverse . . . Silence then becomes evidence of the most convincing character." *Interstate Circuit v. United States,* 306 U.S. 208, 225-226 (1939). Accord: *N.L.R.B. v. A.P.W. Products Co.,* 316 F.2d 899, 903 (C.A. 2, 1963), and authorities cited: *National Maritime Union v. N.L.R.B.,* 353 F.2d 521, 522 (C.A. 2, 1965).

A. The May 11 discharges

The record shows that the day after the Company received the Union's request for recognition, four of the Union adherents were summarily discharged. That the threat of unionization was the motivation for the Company's action was clearly shown in subsequent conversations that Harold Stark had with Peters and with Bishop when, in the context of warning against union activity, he indicated that he had fired the four men because they joined the Union. Notwithstanding these admissions, Harold Stark, testifying for the Company at the Board hearing, claimed that Thompson, Evans and Huff were drunk on May 11, that Evans and Huff were discharged because they were drunk, that Thompson quit, and that Maksymchak was discharged for refusing to work. The Administrative Law Judge, with the Board's affirmance, concluded that the explanation given by Stark for the May 11 terminations was not to be believed, that Stark had learned of the employee's union activity and that he discharged them for this reason (A. 20-21).

Thompson, Evans and Maksymchak had each been employed by the Company for one year prior to their discharges, and Huff had been an employee in 1972 and then again for a 4-month period prior to his discharge. As for Thompson, the Board found that he did not quit, as the Company asserted, but rather, that he was discharged (A. 15-16). Company witness Karen Gsell, who was Harold Stark's secretary, testified that Thompson told her on May 11 that he had quit. She claimed that this

happened while he waited in the office that day to see Office Manager Helga Schenck. The Administrative Law Judge credited Thompson's denial that he told Gsell that he had quit, and found that Gsell had misunderstood Thompson (A. 7 n. 3). This finding is confirmed by the undisputed evidence that when Maksymchak arrived at the office Thompson was sitting in the truck with Evans and Huff waiting for Harold Stark to arrive (A. 7). As the Board found there is no reason why Thompson would have waited with the other employees for Stark if he had quit, nor is any reason suggested by the record as to why he would have quit (A. 7 n. 3).

With respect to Harold Stark's claim that Thompson, Evans and Huff were drunk on May 11, the Administrative Law Judge credited the three employees' denials that they had had anything to drink that day (A. 16; 52, 113, 134). He also credited Maksymchak's denial that the employees had been drinking (A. 16; 83). Further, two of the Company's witnesses, Karen Gsell and Helga Schenck, had occasion to talk to, or observe, the employees, but neither of them testified that any employee was drunk or gave evidence of drinking (A. 16). Indeed Schenck specifically disclaimed any such assertion (A. 16; 260-261).

Harold Stark's contention that he discharged Maksymchak because he refused to work was similarly discredited by the Administrative Law Judge (A. 17). While the employees were waiting in the truck, Maksymchak stated that he did not feel well and did not think he would work that day. A short while later he told Stark that he did not "feel like working" (A. 7; 83, 112, 134). Stark thereupon summarily discharged him, notwithstanding the fact that Maksymchak had been employed by the Company for 12 months and there is no evidence that he had ever theretofore given the Company any cause for dissatisfaction (A. 16). The conclusion that Maksymchak was unlawfully discharged is buttressed, of course, by the credited evidence that when he returned to the Company seeking

reemployment he was told by Harold Stark that he could have his job back if he got out of the Union.[6]

In light of all the circumstances attending the May 11 discharges, as well as the failure of the Administrative Law Judge to credit the Company's attempt to explain the action, we submit, the Board properly found the discharges to have been discriminatorily motivated, and hence, violative of Section 8(a)(3) and (1) of the Act.[7]

B. The discharge of Ortiz

As shown in the Statement, Ortiz, another of the signers of a union card, was discharged on May 16. The Administrative Law Judge found the incident involving his termination to be basically "a credibility problem" (A. 12). The Judge credited Ortiz' testimony that he was told by Harold Stark to go home after he refused to pick up dog droppings with

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[6] Stark's conditioning of Maksymchak's reemployment on his abandonment of the Union was properly found by the Board to be a violation of Section 8(a)(1) of the Act (A. 24). *N.L.R.B. v. Wings & Wheels, Inc.*, 324 F.2d 495, 496 (C.A. 3, 1963).

[7] Before the Board the Company contended that the Administrative Law Judge erred in denying its motion to sequester witnesses and that the denial of the motion was a basis for doubting the credibility of the four employees who were discharged on May 11 following the incident in which they were all involved. The Board, in rejecting the Company's contention, adhered to its long established rule that individuals "named in the complaint as discriminatees are more than mere witnesses and are entitled to remain in attendance throughout the entire hearing." *T.I.L. Sportswear Corp.*, 131 NLRB 176, 177, n. 1 (1961), enf'd, 302 F.2d 186 (C.A.D.C., 1962); *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 295 (1960), enf'd, 291 F.2d 751 (C.A. 8, 1961). In any event, whether to put witnesses under the rule rests within the sound discretion of the Board's Administrative Law Judge and no abuse of discretion has been shown here. See, *N.L.R.B. v. Quality & Service Laundry*, 131 F.2d 182, 183 (C.A. 4, 1942), cert. denied, 318 U.S. 775; *N.L.R.B. v. Great Atlantic & Pacific Tea Co.*, 408 F.2d 374, 375 (C.A. 5, 1969). Merely because some witnesses gave testimony which corroborated testimony given by some other witnesses, "it does not follow that the corroborating testimony was shaped to match the corroborated testimony, or that the [Administrative Law Judge] abused [his] discretion in refusing to put the corroborating witnesses under the rule." *Charles v. United States*, 215 F.2d 831, 833 (C.A. 9, 1954).

his hands. The Judge also credited the testimony of two other witnesses to the incident who corroborated Ortiz, employee Kenroy Bishop and Mrs. Marie Peters, a tenant in the apartment where Ortiz worked (A. 18). In contrast, the Administrative Law Judge discredited Company witnesses Harold Stark and employee Lawrence Moultrie who testified that Ortiz had refused to clean out litter, including dog manure, from several bushes, claiming that that was not his job (A. 17-18). That the Company did in fact discharge Ortiz for union reasons was confirmed the following day, May 17, when Harold Stark told employee Kenroy Bishop that he had "fired all the guys" who had signed for the Union except Bishop (A. 147). Since Stark had discharged Peters earlier that day, his declaration to Bishop was entirely accurate.

C. The discharge of Peters

As shown in the Statement, *supra*, Peters was regarded by the Company as a supervisor and prior to his discharge he was told by Fred Stark that since he was the foreman he could only work for the Company if he stayed away from the Union. On May 17, Peters was discharged by Stark who told him that he had been warned to stay away from the Union, but had failed to do so, so he was fired. Later that same day, Harold Stark discussed the Union with Kenroy Bishop, telling him that with the exception of Bishop everyone who had signed for the Union had been fired.[8] The record thus leaves no room for doubt that the Company considered Peters' union activity impermissible because he was a foreman, and that because he failed to heed Fred Stark's warning in this regard, Stark discharged

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[8] On that same occasion, Harold Stark warned Bishop to "give up" the Union (A. 12; 146-147). The Board properly held that by engaging in these coercive conversations with Peters and Bishop and warning them against continued union activity Stark violated Section 8(a)(1) of the Act. See, *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 130 (C.A. 2, 1970); *N.L.R.B. v. Fitzgerald Mills Corp.*, 313 F.2d 260, 269 (C.A. 2, 1963), cert. denied, 375 U.S. 834.

him. Before the Board the Company claimed that Peters was discharged for lying about going to the Veterans Administration Hospital. The Judge refused to credit this assertion, and noted that before the New York State unemployment compensation authorities the Company had offered a completely different explanation, asserting that Peters had engaged in "misconduct" on the job (A. 20). The New York State authorities found that charge unsustained (*ibid.*). In any event, even if Peters' union activity was not the sole basis for his discharge and the Company had other grounds as well, the fact that his union activity was one reason for his termination suffices to establish the illegality of the action. *N.L.R.B. v. Gladding Keystone Corp., supra,* 435 F.2d at 131-132, and cases cited.

Nor does it matter that the Company might have thought that Peters was a supervisor and that it was within its rights in discharging him for union activity. It is well settled that employee rights under the Act are not "subject to defeasance merely because the employer believes he is not violating the Act in restraining the employee in his exercise of such rights." *N.L.R.B. v. Puerto Rico Rayon Mills, Inc.,* 293 F.2d 941, 945-946 (C.A. 1, 1961); and see, *Welch Scientific Co. v. N.L.R.B.,* 340 F.2d 199, 203 (C.A. 2, 1965).

The Board properly concluded that there was a lack of evidentiary support for the Company's contention that Peters was a supervisor within the meaning of Section 2(11) of the Act, and that he therefore was not subject to the Act's protection against reprisal for union activity.[9] The

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[9] The term "supervisor" is defined in Section 2(11) of the Act as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibily to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(3) excludes from the definition of the term "employee," "any individual employed as supervisor."

evidence shows that Peters was given his assignments to do property maintenance work each day by Fred or Harold Stark (A. 22; 214, 279-280). He was assigned a crew of two or more men whom he would direct and he would see that work projects to which they were assigned were properly completed. Peters worked with the crew (*ibid.*). There is no evidence as to Peters' rate of pay (A. 22). He had no authority over the rates of pay of other employees (A. 295). He had no authority to discharge an employee and he had never attempted to recommend a discharge (A. 226). Nor is there any evidence that he had authority to hire, or to recommend the hiring of an employee. Although Peters had the title of foreman, that is not determinative of his status, for "the important thing is the possession and exercise of actual supervisory duties and authority and not the formal title." *N.L.R.B. v. Southern Bleachery & Print Works,* 257 F.2d 235, 239 (C.A. 4, 1958), cert. denied, 359 U.S. 911. Accord: *N.L.R.B. v. Newton Co.*, 236 F.2d 438, 442 (C.A. 5, 1956). In sum, the evidence reveals that Peters was in the nature of a crew leader or straw boss who lacked the statutory indicia of a supervisor. "It is a question of fact in every case as to whether the individual is merely a superior workman or leadman who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management." *N.L.R.B. v. Southern Bleachery & Print Works, supra,* 257 F.2d at 239. It is clear from the record that Peters did not share any of the "power of management" and that his direction of other employees was at most of a "routine or perfunctory nature." *Ibid.* And see, *Precision Fabricators, Inc. v. N.L.R.B.*, 204 F.2d 567, 568-569 (C.A. 2, 1953). Since Peters had none of the statutorily prescribed characteristics of a supervisor the Board properly found his discharge to be a violation of Section 8(a)(3) and (1) of the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that judgment should be entered enforcing the Board's order in full.

ALLISON W. BROWN, JR.,
GRANT MORRIS,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

March 1975

UNITED STATES COURT OF APPEALS

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FRED STARK AND JAMAICA 201 ST. CORP., INC. AND JAMAICA 202 ST. CORP., INC., Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Attn: Charles R. Katz, Esquire
360 Lexington Avenue
New York, New York 10017

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 10th day of March, 1975.